

Vet. App. No. 15-3371

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

EUGENE R. WALKER, JR.
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE,
SECRETARY OF VETERANS AFFAIRS**

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B. NATURE OF THE CASE

Appellant, Eugene R. Walker, Jr. appeals six separate Board of Veterans' Appeals (Board) decisions, all dated August 7, 2015. [Record Before the Agency [R.] at 2-101]. In total, the Board decisions pertained to a total of 34 issues: 21 issues were denied, two were granted, seven were remanded, and four were dismissed. Appellant has appealed a majority of these issues, as well as several others, which were not decided by the Board. The Secretary's position as to each issue is described in further detail below.

C. STATEMENT OF THE FACTS

Appellant served on active duty in the United States Army from July 1974 to July 1977. [R. at 681].

In July 1992, the Department of Veterans Affairs (VA) Regional Office (RO) denied Appellant's claim to increase his evaluation for a right ankle condition, a left ankle condition, and left hip condition, and a right hip condition, all as related to polymyopathy with a history of sarcoidosis and restricted range of motion. [R. at 8241-42]. In a March 1998 decision, the Board remanded these four claims for additional development. [R. at 6986-93].

In December 2000, Appellant filed claims for entitlement to service connection for hepatitis C, manic depression, prostate inflammation, an eye condition and a weight condition. [R. at 7023].

In July 2003, the RO issued a rating decision that denied, in relevant part, entitlement to service connection for skin rashes, prostate inflammation, hepatitis C, depression, an eye condition with malnutrition, a weight condition, posttraumatic stress disorder (PTSD), and right leg shortening. [6407-15].

In a February 2005 rating decision, the RO increased Appellant's evaluation of polymyopathy involving the right ankle with a history of sarcoidosis from 20 percent to 30 percent, effective November 24, 1998. [R. at 5560-64].

Appellant appealed that decision, and in December 2006, the Board issued a decision denying, in relevant part, entitlement to service connection for a prostate disability, service connection for a weight problem, and service connection for shortening of the right leg. [R. at 5190-5208]. The Board's decision also remanded, in relevant part, the issues of service connection for skin disease, an acquired psychiatric disability, and hepatitis C, as well as the issues of increased ratings for polymyopathy involving the bilateral ankles and bilateral hips with a history of sarcoidosis. *Id.*

A separate December 2006 BVA decision determined that an apportionment of Appellant's service-connected disability compensation benefits in the amount of \$100.00 monthly in support of his dependent

daughter was appropriate, and Appellant's appeal was denied. [R. at 5166-75].

Another December 2006 BVA decision determined that (1) an overpayment of VA disability benefits in the amount of \$200.00 was properly created and waiver of recovery was denied, and (2) that an overpayment of additional dependency compensation benefits in the original amount of \$1,713.00 was properly created; waiver in that amount was granted. [R. at 5176-89].

A May 2008 rating decision granted entitlement to total disability as a result of individual unemployability (TDIU) effective January 23, 2007, and granted entitlement to an earlier effective date for service connection for polymyopathy involving the bilateral ankles with a history of sarcoidosis of January 9, 1986, an earlier effective date for service connection for polymyopathy involving the bilateral hips with a history of sarcoidosis of January 9, 1986, denied service connection for left leg shortening and peripheral neuropathy, and determined new and material evidence had not been submitted for claims of a prostate condition, an eye condition, right leg shortening, and a weight condition. [R. at 4703-10].

A June 2008 rating decision granted service connection for degenerative joint disease (DJD) of the right hip with a noncompensable rating effective March 22, 2001, and a 40 percent evaluation as of March 13, 2007; granted service connection for DJD of the left hip with a

noncompensable rating effective March 22, 2001, and a 40 percent evaluation as of March 13, 2007; granted service connection for depression with a 30 percent evaluation effective December 12, 2000; granted service connection for hepatitis C with a noncompensable evaluation effective December 12, 2000; increased the evaluation of polymyopathy of the right hip to 20 percent, effective November 24, 1998, and increased the evaluation of polymyopathy of the left hip to 20 percent effective November 24, 1998. [R. at 4398-4404].

In October 2008, the RO issued a rating decision granting service connection for pseudofolliculitis barbae, claimed as skin rashes. [R. at 4354-56].

Also in October 2008, the RO issued a Supplemental Statement of the Case (SSOC) that denied service connection for degenerative disc disease (DDD) of the cervical spine, DDD of the lumbar spine, and an increased evaluation for polymyopathy of the bilateral hips and ankles. [R. at 4357-81].

In November 2008, this Court issued a Memorandum Decision vacating and remanding the Board's December 2006 decision insofar as it denied, in relevant part, Appellant's claims of service connection for a prostate disability, vision loss, a weight problem, and shortening of the right leg. [R. at 3290-93].

In an January 2009 Statement of the Case (SOC), the RO, in relevant part, confirmed that the apportionment of Appellant's disability compensation in the amount of \$75.00 for his dependent child, Deskye, was appropriate; that an overpayment of VA disability benefits in the amount of \$600.00 was properly created and waiver was denied; that service connection was denied for left leg shortening; that no new and material evidence was submitted to reopen claims for service connection for a prostate condition, a bilateral eye condition, weight loss problems, and right leg shortening; that entitlement to an earlier effective date for TDIU was denied; that increased evaluations for DJD of the bilateral hips, depression and hepatitis C was denied, and earlier effective dates for DJD of the bilateral hips and polymyopathy of the bilateral hips was denied. [R. at 4194-4265].

A January 2009 rating decision then granted entitlement to an earlier effective date for service connection for depression as of August 15, 2000; granted entitlement to an earlier effective date for service connection for hepatitis C as of August 15, 2000, and granted entitlement to an earlier effective date for the grant of TDIU as of November 24, 1998. [R. at 4165-73].

In a May 2009 SOC, the RO denied entitlement to an increased evaluation for pseudofolliculitis barbae; denied entitlement to an earlier effective date for the grant of service connection for pseudofolliculitis

barbae; denied entitlement to an earlier effective date for the grant of service connection for depression; denied entitlement to an earlier effective date for the grant of service connection for hepatitis C; and denied entitlement to an earlier effective date for the grant of TDIU. [R. at 4009-4032].

In November 2009, the Board remanded all issues on appeal in order for Appellant to be afforded a hearing. [R. at 3167-71].

A February 2012 Board decision, in relevant part, denied an initial compensable evaluation for hepatitis C; denied an earlier effective date for the award of service connection for pseudofolliculitis barbae; denied an earlier effective date for the award of service connection for depression; and denied an earlier effective date for the award of service connection for hepatitis C. [R. at 2581-2604]. The Board remanded the issues of entitlement to service connection for DDD of the cervical and lumbar spine, ulnar mononeuropathy, bilateral leg shortening, a prostate disorder, vision loss, weight loss, and increased evaluations for polymyopathy of the bilateral hips and ankles, DJD of the bilateral hips, pseudofolliculitis barbae and depression, and entitlement to an earlier effective date for the award of TDIU. *Id.*

A June 2013 rating decision denied entitlement to service connection for cataracts. [R. at 1505-07].

On August 7, 2015, the Board issued six separate decisions pertaining to Appellant's multiplicity of claims. [R. at 2-101]. The following claims were denied: (1) entitlement to an initial rating in excess of 20 percent for cervical spondylosis, (2) entitlement to an initial rating in excess of 20 percent for degeneration of the intervertebral disc, lumbar spine, (3) entitlement to an initial compensable rating for right leg shortening, (4) entitlement to an initial compensable rating for left leg shortening, (5) entitlement to an effective date earlier than March 22, 2001 for service connection for cervical spondylosis, (6) entitlement to an effective date earlier than March 22, 2001 for service connection for degeneration of the intervertebral disc, lumbar spine, (7) entitlement to an effective date earlier than February 3, 2003 for service connection for left leg shortening, (8) entitlement to service connection for a prostate disability, (9) entitlement to service connection for a weight disorder, (10) entitlement to an initial compensable rating prior to March 13, 2007, for service-connected DJD of the right hip, and in excess of 40 percent after, (11) entitlement to an initial compensable rating prior to March 13, 2007, for service-connected DJD of the left hip, and in excess of 40 percent after, (12) entitlement to a rating in excess of 10 percent for polymyopathy of the right hip prior to November 24, 1998, and in excess of 20 percent after November 24, 1998, (13) entitlement to a rating in excess 10 percent for polymyopathy of the left hip prior to November 24, 1998, and in excess of 20 percent after November

24, 1998, (14) entitlement to a rating in excess of 20 percent for right ankle polymyopathy prior to November 24, 1998, and in excess of 30 percent after November 24, 1998, (15) entitlement to a rating in excess of 20 percent for left ankle polymyopathy prior to November 24, 1998, in excess of 30 percent after November 24, 1998, and prior to July 26, 2002, and in excess of 30 percent after January 31, 2003, (16) entitlement to an initial rating in excess of 30 percent for depression, and (17) entitlement to an initial rating in excess of 10 percent for pseudofolliculitis barbae prior to July 17, 2012.

It further determined a timely notice of disagreement (NOD) was not received for the following decisions: (1) a June 2008 rating decision as to the assigned effective date for the award of service connection for DJD of the left hip, (2) a June 2008 rating decision as to the assigned effective date for service connection for DJD of the right hip, (3) a May 2008 rating decision as to the assigned effective date for service connection for polymyopathy involving the left ankle, and (4) a May 2008 rating decision as to the assigned effective date for service connection for polymyopathy involving the right ankle. The Board dismissed the issues of whether a timely notice of disagreement was received for the following decisions, (1) a May 2009 rating decision as to the denial of service connection for depression, (2) an October 2008 rating decision as to the denial of service connection for pseudofolliculitis barbae, (3) a May 2009 rating decision as

to the denial of service connection for hepatitis C, and (4) a May 2009 rating decision as to the denial of service connection for a weight disorder.

The following claims were granted, at least in part: (1) entitlement to an earlier effective date of December 12, 2000, but not earlier, for service connection for right leg shortening, and (2) an increased 30 percent rating, but no higher, for pseudofolliculitis barbae effective July 17, 2012.

The following claims were remanded: (1) entitlement to service connection for cataracts, (2) entitlement to an initial compensable rating for dry eyes, (3) entitlement to an effective date earlier than January 23, 2007, for service connection for dry eyes, (4) entitlement to service connection for bilateral ulnar neuropathy, entitlement to an earlier effective date than November 24, 1998, for TDIU, (5) whether the special apportionment in the amount of \$75 on behalf of Appellant's child was appropriate, (6) whether the special apportionment in the amount of \$200 on behalf of Appellant's child was appropriate, and (7) entitlement to waiver of recovery of compensation overpayment in the amount of \$600 as a result of an apportionment on behalf of Appellant's child, D.W., to include whether the overpayment was properly created.

Appeal to this Court followed.

III. SUMMARY OF ARGUMENT

The various arguments in Appellant's Informal Brief (AB.) are outlined below, as well as an accompanying description of the Secretary's position as it relates to each.

IV. THE SECRETARY'S ARGUMENT

A. Claims Remanded by the Board

Initially, three of the Board decisions contained only a single issue remand. [R. at 88-101]. The following issues were remanded in these three decisions: (1) whether the special apportionment in the amount of \$75 on behalf of the Veteran's child is appropriate, (2) whether the special apportionment in the amount of \$200 on behalf of the Veteran's child is appropriate, and (3) entitlement to waiver of recover of compensation overpayment in the amount of \$600 as a result of an apportionment on behalf of the Veteran's child, D.W., to include whether the overpayment was properly created. *Id.* Upon careful review of Appellant's Informal Brief, it does not appear that these issues were addressed.

The Secretary notes, however, that Appellant did provide argument as to five other issues remanded by the Board. AB. at 1-3 (Entitled "Continuation of Question One"). These additional issues include: (1) entitlement to service connection for cataracts, (2) entitlement to an initial compensable rating for dry eyes, and (3) entitlement to an effective date earlier than January 23, 2007, for the award of service connection for dry

eyes, (4) entitlement to an earlier effective date than November 24, 1998, for a total disability rating based on individual unemployability (TDIU), and (5) entitlement to service connection for bilateral ulnar neuropathy. [R. at 31-32 (2-34); 66-67 (36-69); 81-83 (71-85)].

However, as a Board remand does not constitute a final decision that may be appealed, those eight issues should not be disturbed. See *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

B. Claims Not Adjudicated by the Board

Appellant has also provided argument as to issues not decided by the Board in his Informal Brief, including (1) brain damage, (2) hepatitis C condition (listed separately from the issue of whether a timely NOD was received as to the May 2009 rating decision that denied service connection for hepatitis C), (3) disability home grant, (4) entitlement to an initial rating in excess of regular special monthly compensation (SMC) to R.2/T to an earlier effective date than Sep 9, 2009, for a rating based on individual requires the help of another person (Licensed medical professional) every day to perform the following tasks: - Dressing and undressing-Cleaning and grooming-Feeding-Using the restroom-Adjusting prosthetic or orthopedic appliances frequently, ("Entitlement to an initial rating in excess of regular SMC") (5) Disability compensation and related compensation benefits: 1. Disability of entire human body [due] to service-connected disability, 2. Whole intestine, circulatory system, lymphatic system,

digestive system, endocrine system, skin, hair, nail, and associated glands, including mammary glands, 3. Muscular system, the individual muscles of the body, nervous system, brain, spinal cord, peripheral nerves, male testes, vas deferens, seminal vesicles, prostates, penis, 4. Respiratory system, skeletal system, the individual 206 bones of the skeleton and associated ligaments and other structures, 5. Excretory system, organs of special sense and a list of over 60 individual organs or pair of organs February 26, 2014, (“disability compensation and related compensation benefits”) and (6) Entitlement to a rating in excess of 10 percent for a history of sarcoidosis prior to January 9, 1986.

Appellant provides no clear articulation for the basis of his appeal as to these issues. However, to the extent Appellant is arguing that these issues were reasonably raised in the record, and, therefore, warranted discussion by the Board, his argument is unavailing. Though the Board’s decision must analyze the probative evidence of record, the Board need not comment upon every piece of evidence contained in the record. 38 U.S.C. § 7104(d)(1); *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). The Board need not address issues that were neither raised expressly by the claimant or reasonably by the record. *Robinson v. Peake*, 21 Vet.App. 545, 552-56 (2008) (recognizing that the Board is only required to address issues raised by either the claimant or the evidence of record). Moreover, a claim for benefits is not raised by the record simply

because the evidence of record indicates a disability. 38 C.F.R. § 3.155 (recognizing an informal claim for benefits as any “communication or action, indicating an intent to apply for one or more benefits”). For this reason, this Court has long recognized that medical records cannot themselves establish intent to apply for benefits and do not alone give rise to a claim for benefits based on service connection. *Brannon v. West*, 12 Vet.App. 32, 35 (1998) (“The mere presence of the medical evidence does not establish an intent on the part of the veteran to seek . . . service connection.”).

Appellant cites to the record at pages 6575 and 8127 in connection with his claim for brain damage, stating “It was not any mention of brain damage in the Board statement of the facts.” AB. at 1 (Entitled “Continuation of Question Two”). However, neither of the pages cited reflects treatment for a head injury or brain damage. Page 6575 is a treatment note from Charter Behavioral Health Systems, providing discharge information for (1) Axis I: major depression, recurrent, (2) Axis III: anemia, sarcoidosis, polymyositis, and shortening of the Achilles tendon, and rheumatoid arthritis, and (3) Axis IV: chronic illness. [R. at 6575]. Meanwhile page 8127 of the record is a portion of a Social Security Administration administrative law decision for disability compensation, which did not mention a brain injury. [R. at 8127 (8124-30)].

Second, as to Appellant's appeal for hepatitis C, he states, "It is many incorrect facts and correct facts regarding this issue." AB. at 1 (Entitled "Continuation of Question Two"). He cites to the record at pages 130, 748, 2246, 2987, 2986, 3357, 3366, 3380, and 7913. *Id.* The February 2012 Board decision denied an initial compensable rating for hepatitis C. [R. at 2593 (2581-2604)]. Appellant did not appeal that decision or file a new claim for increase of his hepatitis C evaluation. Regarding his record citations, at page 130, there is a laboratory test result from the NKTl Medical Laboratory indicating that hepatitis C virus ribonucleic acid (HCV RNA) was not detected from the provided sample. [R. at 130]. The record at page 3357 reflects a VA treatment record showing Appellant was diagnosed with chronic hepatitis C in 2000, followed by 48 weeks of treatment. [R. at 3357 (3357-60)]. The record at 3380 again shows positive test results for hepatitis C, but without any intention of behalf of Appellant to apply for benefits. [R. at 3380 (3380-84)]. The remainder of the records cited by Appellant on this issue do not pertain to hepatitis C.

Third, as to Appellant's appeal for "Disability Home Grant", he states "[t]he Department of Veterans Affairs Manila Regional Office denied my application for Special Home Adaption Grant", citing the record at pages 7467 and 9574. However, by rating decision dated March 2011, the Regional Office granted entitlement to special monthly compensation

based on aid and attendance, effective September 9, 2009. [R. at 3026]. Neither of the pages cited reflects an attempt by Appellant to reopen his claim or further pursue these benefits. Appellant also appeals entitlement to an initial rating in excess of regular SMC, he cites a large number of pages in the record. The record does not reveal that Appellant ever submitted any disagreement with the amount of his special monthly compensation after it was awarded in March 2011.

Similarly, as to Appellant's claim for "Disability Compensation and Related compensation Benefits[,]" he appears to request service connection for a number of issues, which were not adjudicated by the Board or claimed by Appellant prior to the Board's 2015 decisions. AB. at 3 (Entitled "Continuation of Question One" No. 36). Again, the pages cited by Appellant generally do not pertain to the disabilities listed under this issue, and, further, do not reflect intent to apply for benefits. See [R. at 245, 295, 770, 767, 737, 736, 711, 2288, 2299, 2315-19, 2321, 2325-26, 2328-37, 2339, 2383, 2391, 2447, 2448, 2983-85, 2975, 2970-73, 2977-79, 2981, 3292, 3317-22, 8395, 7022, 6921-22, 6381].

Finally, as to the issue of entitlement to a rating in excess of 10 percent for a history of sarcoidosis prior to January 9, 1986, the record reflects that Appellant is service-connected for (1) polymyopathy involving the right ankle with a history of sarcoidosis, with a 20 percent rating in place from January 9, 1986 until November 23, 1998, and a 30 percent

rating thereafter, (2) polymyopathy involving the left ankle with a history of sarcoidosis, with a 20 percent evaluation from January 17, 1986, to November 23, 1998, a 30 percent rating from November 24, 1998, to July 25, 2002, a 100 percent evaluation from July 26, to January 30, 2003, and a 30 percent evaluation thereafter, (3) polymyopathy involving the left hip with a history of sarcoidosis causing neurological deficits of left lower extremity, with a 10 percent evaluation from January 9, 1986 to November 23, 1998, and a 20 percent evaluation thereafter, and (4) polymyopathy involving the right hip with a history off sarcoidosis causing neurological deficits of right lower extremity, with a 10 percent evaluation from January 9, 1986 to November 23, 1998, and a 20 percent evaluation thereafter. [R. at 3491-94]. However, it is not clear to the Secretary which of these particular disabilities Appellant is referring to, and, further, Appellant does not demonstrate, nor does the record reflect a request from Appellant to apply for benefits associated with an award of an earlier effective date for any of these disabilities.

Accordingly, as the record does not reflect expressly raised or reasonably raised issues not addressed in the Board's decision, Appellant has not demonstrated that Board erred by declining to discuss the issues of (1) brain damage, (2) hepatitis C, (3) Disability Home Grant, (4) entitlement to an initial rating in excess of regular SMC, (5) "Disability Compensation and Related compensation Benefits[.]" and (6) entitlement

to a rating in excess of 10 percent for a history of sarcoidosis prior to January 9, 1986.

C. Claims Warranting Remand

The Secretary asserts that remand is warranted for following issues adjudicated by the Board: (1) entitlement to an initial rating in excess of 20 percent for a cervical spine disability, (2) entitlement to an initial rating in excess of 20 percent for a lumbar spine disability, (3) entitlement to an initial compensable rating for right leg shortening, and (4) entitlement to an initial compensable rating for left leg shortening, (5) entitlement to an initial compensable rating prior to March 13, 2007, for degenerative joint disease of the right hip, and in excess of 40 percent as of March 13, 2007, (6) entitlement to an initial compensable rating prior to March 13, 2007, for degenerative joint disease of the left hip, and in excess of 40 percent as of March 13, 2007, (7) entitlement to a rating in excess of 10 percent for polymyopathy of the right hip prior to November 24, 1998, (8) entitlement to a rating in excess of 10 percent for polymyopathy of the left hip prior to November 24, 1998, and in excess of 20 percent as of November 24, 1998, (9) entitlement to a rating in excess of 20 percent for right ankle polymyopathy prior to November 24, 1998, and in excess of 30 percent as of November 24, 1998, and (10) entitlement to a rating in excess of 20 percent for left ankle polymyopathy prior to November 24, 1998, in excess

of 30 percent from November 24, 1998, to July 25, 2002, and in excess of 30 percent as of January 31, 2003.

The Board is required to provide an adequate statement of reasons or bases for its findings, and in doing so must consider and discuss all the relevant evidence in the record, as well as provide adequate reasons and bases when rejecting material evidence that is favorable to the veteran. *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (observing that Board is not required to discuss all evidence of record, but must discuss relevant evidence).

With respect to Appellant's claims for an increased initial rating, listed in the preceding paragraph as claims (1) through (4), the Board provides sufficient review of the evidence, but only a brief analysis of that evidence. [R. at 22-23]. The Board does not indicate which diagnostic codes are applied to the evidence, or how that application precludes a higher evaluation. Though earlier in its decision the Board did reference some of the relevant rating criteria, [R. at 13-17], the analysis portion does not state which codes are for application to the evidence and, therefore, it is unclear which codes were applied to the facts of Appellant's case.

The Board, furthermore, appears to either mischaracterize portions of evidence or, alternately, does not explain its findings. The Board initially states that review of evidence pertaining to the cervical spine reflects that in July 2012, Appellant underwent a VA examination where "[t]here was

functional loss, functional impairment, and additional loss of motion with less movement than normal and pain on movement.” [R. at 20]. However, the Board’s analysis concludes that “[t]he objective medical findings during the course of this appeal are not indicative of more severe cervical spine [. . .] disabilities, including as a result of functional loss limiting the ability to perform the normal working movements of the body with normal excursion, strength, speed, coordination, or endurance.” [R. at 23]. The Board’s analysis does not account for the findings of the July 2012 examination, or otherwise explain its two contradictory findings.

Finally, the Board’s decision notes that at the July 2012 VA examination for the lumbar spine includes a diagnosis of degeneration of intervertebral disc of the lumbar spine, [R. at 20], but later notes that the examiner determined Appellant did not have intervertebral disc syndrome (IVDS). [R. at 21]. Inspection of the July 2012 VA examination does not reveal a medical explanation of these seemingly inconsistent findings, or how these two conditions are distinguishable. See [R. at 2396-2409]. The Board, moreover, did discuss the rating criteria for IVDS, [R. at 14], but did not address whether Appellant had IVDS, or whether the IVDS diagnostic criteria should be applied to the evidence. Accordingly, the Board’s statement of reasons or bases with respect to these 4 issues was inadequate.

Regarding Appellant's claims for increased ratings for degenerative joint disease and polymyopathy of the bilateral hips, and polymyopathy of the bilateral ankles, listed as issues (5) through (10) in the initial paragraph of this section, the Board summarily denied a higher evaluation for all issues. [R. at 65-66]. Similar to the error described above, the Board reviewed the relevant evidence, but did not describe which diagnostic codes were applicable to the evidence or how the application of the diagnostic criteria led to a preclusion of a higher evaluation. [R. at 45-66]. The analysis section summarizes the presumably relevant evidence, but then states, "the Veteran's service-connected lower extremity disabilities involve complex medical disorders and that the combined [e]ffect is severe, but that the assigned ratings for these individual disabilities are adequate compensation for the combine[d] effects." [R. at 55]. However, again, it is unclear which diagnostic codes are used to assign adequate compensation. Moreover, there is no discussion of whether Appellant's hip and ankle disabilities result in functional loss, and, if so, whether higher ratings are appropriate. *Mitchell v. Shinseki*, 25 Vet.App. 32, 38 (2011) ("[F]unctional loss caused by pain must be rated at the same level as if that loss were caused by some other factor that actually limited motion.")

Accordingly, the Board's decision is insufficient to enable Appellant to understand the precise basis for the Board's decision, or to facilitate informed review by this Court. See 38 U.S.C. § 7104(d)(1); *Allday v.*

Brown, 7 Vet.App. 517, 527 (1995). For these reasons, the Secretary believes that remand is warranted as to those issues discussed immediately above so the Board may provide a better statement of reasons and bases for its determinations. *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (“Where the Board has ... failed to provide an adequate statement of reasons or bases for its determinations ... a remand is the appropriate remedy.”).

D. Claims Appropriately Denied by the Board

The Secretary contends there was no clear error in the Board’s determination regarding the following issues: (1) entitlement to an effective date earlier than March 22, 2001, for the award of service connection for a cervical spine disability, (2) entitlement to an effective date earlier than March 22, 2001, for the award of service connection for degenerative of the intervertebral disc, lumbar spine, (3) entitlement to an effective date earlier than February 3, 2003, for the award of service connection for left leg shortening, (4) entitlement to an effective date earlier than February 3, 2003, for the award of service connection for right leg shortening (5) whether an NOD to a June 2008 rating decision that assigned an effective date for service connection for a left hip disability was timely, (5) whether an NOD to a June 2008 rating decision that assigned an effective date for service connection for a right hip disability was timely, (6) whether an NOD to a May 2008 rating decision that assigned an effective date for service

connection for a left ankle disability was timely, (7) whether an NOD to a May 2008 rating decision that assigned an effective date for service connection for a right ankle disability was timely, (8) whether an NOD to a May 2009 rating decision that denied service connection for depression was timely, (9) whether an NOD to a October 2008 rating decision that denied service connection for pseudofolliculitis barbae was timely, (10) whether an NOD to a May 2009 rating decision that denied service connection for hepatitis C was timely, (11) whether an NOD to a May 2009 rating decision that denied service connection for a weight disorder was timely, (12) entitlement to an initial rating in excess of 30 percent for depression, (13) entitlement to an initial rating in excess of 10 percent for pseudofolliculitis barbae, (14) entitlement to service connection for a prostate disability, and (15) entitlement to service connection for a weight disorder.

In any case, the burden is on the appellant to demonstrate error in the Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (stating that an appellant bears the burden of demonstrating error). To warrant judicial interference with that decision, the appellant must demonstrate that such error was prejudicial to the adjudication of his claim. *Shinseki v. Sanders*, 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). Finally, it is the responsibility of the appellant, and the appellant

alone, to articulate the basis of his or her arguments and develop those arguments sufficient to permit an informed consideration of the same. See *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that Court will not entertain underdeveloped arguments).

Appellant does not articulate any error in the adjudication of the denied claims. The Board's decisions are supported by adequate statements of reasons and bases and the evidence of record does not demonstrate error in the Board's findings or conclusions.

Regarding Appellant's earlier effective date claims, listed as issues (1) through (4) in the preceding paragraph, the Board denied these claims with the exception of the claim for entitlement to an effective date earlier than February 3, 2003, for the award of service connection for right leg shortening, which the Board granted with an effective date of December 12, 2000. [R. at 29-30]. In support of his claims, Appellant does not provide any argument as to what he believes is Board error. Rather, Appellant only provides citation to specific pages of the record without any indication of how these portions of the record provide support for these claims or demonstrate error. Specifically, the Board's determination with respect to these claims was based on the date of receipt of the claim, in accordance with 38 U.S.C. § 5110(a)¹. [R. at 25-26]. The evidence cited

¹ "Unless specifically provided otherwise in this chapter [. . .], the effective date of an award based on an original claim, a claim reopened after final

by Appellant does not contradict these determinations or point to any specific communications prior to those identified by the Board that could be construed as claims.

Regarding the issues of whether a timely NOD was filed, listed as issues (5) through (7) of the initial paragraph of this section, the Board determined that no timely NOD was submitted for any of the above rating decisions. [R. at 30]. In its decision, the Board explained that Appellant was notified of all 4 rating decisions on August 4, 2008, and that no statement of disagreement was submitted by the Appellant until October 2012. [R. at 27]. Again, Appellant provides no argument and points to no evidence to contradict the Board's findings.

Regarding the remaining issues of whether a timely NOD was filed, listed as issues (8) through (11) of the initial paragraph of this section, the Board dismissed the appeals as withdrawn. [R. 30]. As to the appeals for depression, hepatitis C and pseudofolliculitis, the Board determined that service connection was granted for these claims by subsequent rating decision. [R. at 28]. As to the appeal for weight disorder, the Board determined that claim remained on appeal from a July 2003 rating decision and was addressed in a separate Board decision. *Id.* Again, Appellant

adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

provides no argument alleging specific error in the Board's decision and points to no evidence to contradict the Board's findings.

Regarding Appellant's increased rating claims, listed as issues (12) and (13) in the initial paragraph of this section, the Board denied a higher evaluation for depression, but granted a 30 percent rating for pseudofolliculitis barbae as of July 17, 2012. [R. at 66]. In deciding the claims, the Board reviewed the evidence of record, and provided a detailed analysis for its conclusions regarding the application of relevant diagnostic criteria to the evidence. [R. at 56-63]. Specifically, the Board found that Appellant's symptoms of depression, including his disturbances of motivation and mood, did not reflect occupational and social impairment with reduced reliability and productivity as required under the General Rating Formula for Mental Disorders. [R. at 56-60]; see 38 C.F.R. § 4.130, Diagnostic Code 9434. Further, the Board discussed the relevant rating criteria for Appellant's skin disorder, and found that prior to July 17, 2012, Appellant's pseudofolliculitis barbae was "manifested by no more than exfoliation, exudation, or itching involving an exposed surface", and therefore a rating in excess was not warranted for that time. [R. at 61-63]. As to the period beginning July 17, 2012, the Board determined Appellant's pseudofolliculitis barbae was "shown to require antihistamines and hydrocortisone cream use for six weeks or more, but not constantly, with more than five percent and less than 20 percent of the exposed areas

affected”, leading to a 30 percent rating. *Id.* Appellant does not demonstrate error in the Board’s findings nor can the Secretary discern any.

As to the Board’s decision regarding service connection for a weight disorder, the Board reviewed the relevant evidence, including service treatment records, [R. at 687-88, 690-91], and a September 2012 VA medical opinion, in which Appellant reported that he no longer had a weight disorder. [R. at 79 (71-85)]; see [R. at 2104 (2102-05)]. At examination, Appellant stated that he no longer wished to pursue a claim for a weight disorder. [R. at 2104]. The examiner added that Appellant reported being 150 pounds, or “normal”, at separation from service, and his previous problems with “being significantly overweight” were unrelated to his diagnosed disabilities. *Id.* The Board also considered an October 2012 statement from Appellant in which he stated that he had a weight condition for over 30 years, and that although his weight decreased, it was “not enough.” [R. at 79]; see [R. at 1997]. Appellant attributed his “body conditioning” to use of a wheelchair. *Id.*

The Board’s decision determined that there was no evidence of a weight disorder due to service or a service-connected disability. [R. at 79]. This determination is based on the medical and lay evidence of record, which does not demonstrate Appellant had any diagnosed disability during the course of his appeal. Appellant provides no evidence to the contrary.

Finally, as to his claimed prostate disability, the Board reviewed the July 2012 VA examination of record, in which Appellant reported being diagnosed with a prostate disability in service in 1975, but noted the examiner's indication that no such evidence could be found in the service records. [R. at 78]; see [R. at 2287-97]. The July 2012 examiner also found that Appellant's currently diagnosed prostatic hypertrophy was less likely than not proximately due to or the result of service or a service-connected disability. [R. at 78-79]; see [R. at 2297]. The examiner also noted that "[b]enign prostatic hypertrophy is commonly noted as men age." *Id.*

Based on the above evidence, the Board determined that the evidence did not support a finding of a current prostate disability which was incurred in or as a result of service, or another service-connected disability. [R. at 79]. The Board also concluded Appellant's lay statements regarding prostate problems beginning in service were not credible due to "bias and inconsistency", based on the fact that they were made many years after discharge from service and were inconsistent with the medical evidence of record. [R. at 79-80]. Therefore, the Board's determination is supported by evidence of record and provides a basis from which Appellant can decipher the basis for the denial of his claim. Appellant does not demonstrate error in the Board's conclusions.

As to all of the issues discussed in this section, Appellant has failed to carry his burden in demonstrating prejudice in the Board's decision. *Sanders*, 556 U.S. at 409. Accordingly, the Board's determinations as to these issues should be affirmed.

CONCLUSION

WHEREFORE, for the reasons discussed above, the Court should affirm in part, and remand in part, the Board's August 7, 2015, decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 26th day of August, 2016, a copy of the foregoing was mailed, postage prepaid, to:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Julia A. Turner
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